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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALBERTSON'S, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

Of Counsel
RITA A. CAVANAGH
DEWEY BALLANTINE
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006-4605
(202) 862-1000

ROGER A. CRAWFORD, JR.
FOOD MARKETING INSTITUTE
800 Connecticut Ave., N.W.
Washington, D.C. 20006-2701

GERALD A. KAFKA
Counsel of Record
DEWEY BALLANTINE
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006-4605
(202) 862-1000
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether central heating, ventilating, and air-conditioning systems installed in supermarkets to meet the temperature and humidity requirements set by manufacturers of refrigerated food cases constitute "tangible personal property" within the meaning of section 48 of the Internal Revenue Code.

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BRIEF *AMICUS CURIAE* OF THE FOOD MARKETING INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Food Marketing Institute respectfully submits this brief in support of the petition for writ of certiorari of Petitioner, Albertson's, Inc.[1] The Food Marketing Institute (hereinafter "FMI" or "the Institute") is a nonprofit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1500 members. Its membership consists of food retailers and wholesalers in the United States and worldwide. FMI's domestic members operate approximately 21,000 retail food stores, includ-

[1] Food Marketing Institute has received the written consents of the Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

ing large multi-store chains, small regional firms and independent supermarkets, with annual sales volume of $220 billion.

At issue in this case is the tax treatment of central heating, ventilation and air conditioning systems (hereinafter "HVACs") utilized in the retail food industry to maintain strict temperature and humidity control of refrigerated and frozen food display cases. FMI is concerned that the Ninth Circuit's flawed opinion will deny the industry the ability to treat HVACs as "tangible personal property" pursuant to section 48 of the Internal Revenue Code.[2] The inclusion of HVACs within this definition determines whether the investment tax credit is available for such equipment for years prior to 1986 and whether, on a continuing basis, such equipment qualifies for accelerated depreciation under Internal Revenue Code section 168. As an industry uniquely affected by this issue, the Institute's members have a vital interest in the proper disposition of this case.

FACTUAL BACKGROUND

The Ninth Circuit's error was one of regulatory interpretation recast as factual error. A brief recapitulation of the evidence in its proper industry context provides a clearer perspective.

It is axiomatic that a retail business requires customers but, more fundamentally, it requires a product to sell. Retail food establishments, whether a small grocery store or a national supermarket chain, are in the business of selling food. Although non-food products (such as pharmaceuticals or health and beauty care products) also are sold, food sales account for over 70 percent of grocery

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[2] Unless otherwise noted, all section references are to the Internal Revenue Code of 1954, 26 U.S.C., as amended, and all references to regulations are to Treasury regulations promulgated thereunder (26 C.F.R.).

store sales nationally. *See* Food Marketing Institute, Key Industry Facts 1995, p. 7.

What may be less apparent is that perishable foods, and more particularly refrigerated and frozen foods, are the lifeblood of a retail food store. Perishable foods account for $50 of every $100 spent in a supermarket, and items requiring refrigeration, including deli items, meats, fish, dairy products and frozen foods, are the major component of this expenditure. *See* Progressive Grocer Annual Report, April 1995, p. 26. The importance of refrigerated and frozen foods to a grocery store, however, far exceeds their dollar value because consumers frequent grocery stores primarily to purchase such items. As a result, a common marketing strategy of supermarkets is to display such items around the perimeter and/or down the center aisles of a store to encourage the customer to shop the entire store. This display arrangement is familiar to any consumer who has shopped at a grocery store and is a direct consequence of the importance of refrigerated and frozen foods in attracting customers.

It is self-evident that refrigerated and frozen foods require refrigeration to prevent spoilage and package deterioration. Food spoilage is of paramount importance to the food retail industry for reasons of safety, and likewise is a principal concern of store customers. Logic dictates that consumers will not patronize stores whose perishable products show signs of spoilage, irrespective of the quality of other grocery items. Retail food stores rely on refrigerated and frozen food cases (hereinafter "refrigerated cases") to display and preserve foods requiring refrigeration. Several different types of cases are typically used, based on the particular needs of the individual business, and most consumers are familiar with the open-front and closed-door cases used for this purpose.

Refrigeration is a significant expense. The energy costs of a supermarket typically are second only to labor in

relative expense. The operation of refrigerated cases commonly accounts for 50 percent or more of supermarket energy costs. This energy is consumed both in the machine room (containing condensers and compressors) and at the display case (air-circulation fans, anti-condensate heats, lights and defrost systems). *See* Air Conditioning, Heating & Refrigeration News, "Food Industry is Huge Market for Refrigeration Manufacturers," November 14, 1994. Refrigeration costs are particularly critical to a grocery store's profitability because of the highly competitive nature of the industry where net profits typically range from one to two percent. Equally, the loss of its refrigerated and frozen foods to spoilage or deterioration adversely affects inventory costs and profits.

Refrigerated cases, irrespective of type, operate optimally within the confines of temperature and humidity levels set by manufacturer specifications. In Petitioner's case, the manufacturer specifications recommended an ambient store environment at or below 75 degrees Fahrenheit and at or below 55 percent relative humidity. These specifications are those commonly established for refrigerated cases used in the industry. Achieving those specifications is a function both of the refrigerated cases and the HVAC system because of the interaction between a store's environment and the functioning of the cases.

As recognized by the Tax Court below, the quality of food in refrigerated cases can be adversely affected if the ambient temperature in the store is too high, even if the cases are functioning properly, and icing of coils can occur when the relative humidity is too high, which also affects the proper functioning of the cases. App. D at 72a. Indeed, it is no exaggeration to say that the enemy of a supermarket is high humidity. Proper dehumidification translates into less moisture condensation on the cases, a reduced burden on the heaters which prevent condensation from fogging up the cases, reduced burden on the air-conditioning equipment, decreased de-

frost cycles and run-time for the cases, reduced condensation on the evaporator coils and reduced frost build-up or sweating on food products. As the Tax Court discussed specifically in relation to the shelf life of meat products, manufacturers' specifications as to temperature and humidity must be strictly maintained. Even minor variations can cause improper functioning of the cases and food spoilage. App. D at 74a.

Petitioner submitted evidence below that its HVAC systems were installed and designed solely with the operating requirements of its refrigerated cases in mind. For example, the air delivery systems that were part of the HVAC system were designed in a special "T" configuration, which moved air through the stores in a manner that would maintain the conditions necessary to operate the cases efficiently. This design would not be found in HVAC systems used in stores without refrigerated cases. Petitioner also demonstrated that HVAC systems designed for human comfort would not have met its refrigeration requirements. For example, in two instances where Petitioner acquired stores previously used as retail department stores, the existing HVAC systems were replaced with systems designed to meet the requirements of Petitioner's refrigerated cases. In these and other respects, Petitioner demonstrated the unique relationship between its refrigerated cases and HVAC systems. Further affirmation was found in the fact that Petitioner's HVAC system operated 24 hours a day, even when Petitioner's stores were closed to customers. App. D at 80a.

Equally important, the Tax Court rejected as not credible Respondent's expert witness reports that Petitioner had another substantial purpose, namely, employee and customer comfort, for the particular HVAC system deployed. The court stated in this regard that "[w]e do not find respondent's experts persuasive in support of this proposition because many of the authorities relied upon by respondent's experts do not directly support the

expert's conclusion. . . ." App. D at 79a. The court instead found Petitioner's evidence persuasive that the ambient store environment maintained for operation of the refrigerated cases caused the store temperature to be uncomfortably cold to many of its customers. App. D at 80a.

Petitioner's proof was more than adequate to support the Tax Court's factual finding that the regulatory "sole justification" test was satisfied. The correlative effects on ventilation and comfort were understood to be secondary and largely the result of temperature and humidity specifications for the refrigerated cases within levels of human tolerance, if not always optimum human comfort. As articulated by the Tax Court, "[t]he fact that manufacturers may have designed their cases so they could generally be operated in a 'comfortable' ambient environment was an incidental benefit to petitioner." *Id.* The Ninth Circuit's contrary conclusion was not due to clear error by the Tax Court but, rather, the Ninth Circuit's reformulation of the governing legal standard so as to treat the Tax Court's factual findings as largely irrelevant.

SUMMARY OF THE ARGUMENT

The question presented is whether HVACs utilized by Petitioner, a corporation operating several hundred retail grocery and drug stores, are "tangible personal property" within the meaning of Treasury Regulation § 1.48-1 (e)(2) and, therefore, eligible for the investment tax credit or accelerated depreciation. This determination depends on whether the "sole justification" for the installation of the HVAC equipment is that such equipment "is required to meet temperature or humidity requirements which are essential for the operation of other machinery or the processing of materials or foodstuffs," irrespective of whether the equipment "incidentally provides for the comfort of employees, or serves, to an insubstantial degree, areas where such temperature or

humidity requirements are not essential." Reg. § 1.48-1 (e)(2).

This case merits review because the Ninth Circuit, in acknowledged and direct conflict with the Eleventh Circuit in *Piggly Wiggly Southern, Inc. v. Commissioner*, 803 F.2d 1572 (11th Cir. 1986), and with the Tax Court,[3] has adopted an unreasonably restrictive interpretation of the "sole justification" requirement of the regulation. The Ninth Circuit's interpretation effectively prohibits tangible-personal-property treatment of HVAC equipment utilized in the retail food industry for strict temperature and humidity control of refrigerated display cases. The regulation explicitly permits such treatment notwithstanding any incidental collateral effects on ventilation or comfort inherent in the function of such HVAC equipment. However, the Ninth Circuit treats such collateral effects as dispositive evidence of multiple purposes for the installation of the equipment, thereby precluding satisfaction of the "sole justification" requirement. This interpretation impermissibly narrows the scope of the regulation.

For national or regional food chains, the conflict with the Eleventh Circuit and the Tax Court created by this decision will produce significantly differing investment tax credit and depreciation treatment for retail food establishments in close geographical proximity and direct competition based merely on the fortuity of their corporate headquarter locations. Such inequitable results are of fundamental concern to the Institute and its members.

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[3] It is well established that uniformity among the circuits in tax cases is especially important to ensure predictable and equal administration of the federal income tax system. *See, e.g., United States v. Gilbert Assocs., Inc.*, 345 U.S. 361, 364 (1953); *Unger v. Commissioner*, 936 F.2d 1316, 1320 (D.C. Cir. 1991); *Nickell v. Commissioner*, 831 F.2d 1265, 1270 (6th Cir. 1987); *First Charter Fin. Corp. v. United States*, 669 F.2d 1342, 1345 (9th Cir. 1982).

REASON FOR GRANTING WRIT OF CERTIORARI

THE NINTH CIRCUIT MISCONSTRUED THE APPLICABLE LAW AND CREATED A CONFLICT AMONG THE CIRCUITS

The decision of the Ninth Circuit is in direct conflict with the decision of the Eleventh Circuit in *Piggly Wiggly Southern, Inc. v. Commissioner*, 803 F.2d 1572 (11th Cir. 1986), as well as the Tax Court which has twice considered this precise issue. This conflict is the result of an erroneous analysis of the applicable regulatory scheme.

Regulation section 1.48-1(e)(2) generally treats "all components (whether in, on, or adjacent to the building) of a central air conditioning or heating system, including motors, compressors, pipes and ducts . . . relating to the operation or maintenance of a building," as "structural components" for which the investment tax credit, for years prior to 1986, is not available. However, the regulatory scheme creates a special exception for:

> machinery the sole justification for the installation of which is the fact that such machinery is required to meet temperature or humidity requirements which are essential for the operation of other machinery or the processing of materials or foodstuffs.

Reg. § 1.48-1(e)(2). The regulation thus makes a critical distinction between HVAC equipment that is a structural component of the operation and maintenance of a building, and HVAC equipment that is installed in response to temperature and humidity requirements of other machinery. On its face, therefore, the regulation contemplates the treatment of HVAC equipment installed precisely for the purpose installed in this case as tangible personal property, rather than as a structural component. The evidence in the record below that Petitioner's equipment was installed for, and essential to, this purpose is uncontroverted.

The regulation further provides that "[m]achinery may meet the 'sole justification' test" "even though it incidentally provides for the comfort of employees, or serves, to an insubstantial degree, areas where such temperature or humidity requirements are not essential." *Id.* The regulation then provides an example which satisfies the regulatory test:

> For example, an air conditioning and humidification system installed in a textile plant in order to maintain the temperature or humidity within a narrow optimum range which is critical in processing particular types of yarn or cloth is not included within the term "structural components."

Id.

Every other court that has considered the question posed in this case has construed the regulation to require a facts-and-circumstances determination which balances the essential justification for the equipment against any corollary benefits that may result. Irrespective of the particular results in each case, this approach has entailed careful attention to the evidence proffered by the parties.

In the only case on all fours with this one, *Piggly Wiggly Southern, Inc. v. Commissioner*, 84 T.C. 739 (1985), *aff'd*, 803 F.2d 1572 (11th Cir. 1986), the Tax Court held for the taxpayer. It accepted the taxpayer's evidence as to the purpose for which the HVAC equipment was installed and rejected Respondent's evidence that the HVAC units were installed to allow the taxpayer to attract customers. The evidence proffered by Respondent was found to be based on generalities and to "err[] in its failure to look at facts relating to petitioner's specific situation." 84 T.C. at 752. Although recognizing that "[t]he operation of the HVAC units indubitably benefited Petitioner's workers and customers," the court concluded that "this was a collateral benefit, incidental to the maintenance of proper environmental conditions for the operation of petitioner's machinery." *Id.* at 753. The court

summarily rejected Respondent's argument to the contrary:

> It is bootstrapping to argue, post hoc ergo propter hoc, that where a collateral benefit necessarily follows an action, that the collateral benefit belies another basis as the justification for the action.

Id.

On appeal, Respondent urged the Eleventh Circuit to reverse for precisely the reason urged upon, and adopted by, the Ninth Circuit in this case, to wit, that "refrigeration equipment requirements could not have been the exclusive justification because Piggly Wiggly needed some type of HVAC equipment for customer and worker comfort in order to remain competitive." 803 F.2d at 1575. The Eleventh Circuit rejected the Commissioner's implicit equation of sole justification with "exclusive justification." The Court explained that the regulation calls for a "balancing of the 'sole justification' versus 'incidental benefits'." *See id.*

In contrast, the Ninth Circuit in this case narrowly interpreted the sole justification test to mean exclusive justification. It substituted the bootstrapping logic decisively rejected by the Eleventh Circuit and the Tax Court for the factual inquiry mandated by the regulation. The decision of the Ninth Circuit thus is diametrically opposed to the regulatory interpretation adopted by the Eleventh Circuit and the Tax Court. As those two courts appreciated, to treat a collateral effect as tantamount to, and dispositive evidence of, a separate purpose for the installation of HVAC equipment effectively eviscerates the regulatory exception for such equipment even when installed for the precise purpose contemplated by the regulation.

Because the Ninth Circuit misconstrued the applicable legal standard, it presupposed factual findings contrary to those made by the Tax Court, specifically, as to the importance and degree of customer comfort (or discomfort)

associated with the operation of Petitioner's HVAC equipment. It is well known, and Petitioner's evidence in this regard was consistent with general experience in the retail food industry, that customers frequently complain of the cold temperatures necessitated by operation of the HVAC equipment to maintain the ambient temperature and humidity environment necessary for proper operation of refrigerated and frozen food cases. An important component of Petitioner's evidence in this regard was a 1979 publication of the Institute entitled "Why Is It So Cold In Here?," which addressed common customer complaints about cold store temperatures. "Unlike other commercial buildings, supermarkets do not base air conditioning on comfort considerations. Rather, air conditioning works together with the refrigerators in keeping perishable foods at proper temperatures." *See* Pet. Ex. 96-CR ("Pet. Ex." refers to Petitioner's trial exhibit). The Tax Court acknowledged the strength of Petitioner's evidence in this regard as to "discomfort to many customers who complained to petitioner's employees that the stores were uncomfortably cold. Nevertheless petitioner could not raise its store temperature to accommodate its customers without risking spoilage of its refrigerated food products displayed in open-front cases." App. D at 74a. Indeed, as Petitioner also demonstrated below, its employees were not permitted to adjust store thermostats or temperatures for comfort-related reasons. Thermostat settings were established and maintained strictly for the operation of the refrigerated cases.

The Ninth Circuit's legal analysis also overlooked facts considered by the Tax Court concerning the role of the ventilation function of the HVAC system in the proper operation of the refrigerated cases. Ventilation is a constituent function of an HVAC system because air must circulate through the system to be properly conditioned in terms of temperature and humidity. The record contains substantial evidence in this regard that ventilation was essential to the proper functioning of Petitioner's refrig-

erated cases. Moreover, Petitioner demonstrated that it had other ventilation systems (not at issue) to serve sanitation and cleanliness purposes. *See* Petition for Rehearing at 6-8.

Finally, the Ninth Circuit's opinion that "during the 1950s, Albertson's had already installed HVAC systems in most of its supermarkets, well before it was aware of any interrelationship between HVAC systems and the proper functioning of its other equipment" is not supported by the record below. App. B at 39a. The Court disregarded evidence in the record that the connection between HVAC systems and the operation of refrigerated cases was known in the industry years before Petitioner's food stores were air-conditioned.[4] (*See* Pet. for Rehearing at 3, 9-11.)

In practical effect, the Ninth Circuit has established a *per se* rule that, as a matter of law, will preclude virtually any HVAC equipment from meeting the regulatory requirements.[5] The Ninth Circuit's reasoning simply cannot be reconciled with the regulation's explicit allowance for the precise types of incidental benefits that are associated with Petitioner's HVAC equipment. Nor can it be reconciled with the example in the regulation. In that example, the air-conditioning and humidification system installed in the textile plant necessarily provided air conditioning to the employees and other occupants of the

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[4] The Court's reference to Petitioner's situation four decades ago is particularly irrelevant because grocery stores in the 1950s did not widely use the open-front refrigerated cases used throughout modern supermarkets today.

[5] The only other court to have addressed this issue, the Court of Federal Claims, also undertook a detailed factual inquiry and distinguished its holding from the decision in *Piggly Wiggly* and the Tax Court's decision in this case on the basis of differences in the proof proffered by the parties. *See Publix Supermarkets, Inc. v. Commissioner*, 26 Cl. Ct. 161 (1992). *See also Circle K Corp. v. Commissioner*, 43 T.C.M. (CCH) 1524 (1982), which the Tax Court distinguished from *Piggly Wiggly* on its facts. *See* 84 T.C. at 752.

textile plant. The regulation clearly states, however, that such corollary benefits do not preclude satisfaction of the governing regulatory standard.

The Ninth Circuit's enfeeblement of the regulation is conclusively demonstrated by the Court's reliance on a comparison of the effects of Petitioner's HVAC system on air quality or comfort with the hypothetical absence of any HVAC system:

> [W]e find it impossible to say that air conditioning during the summer and heating during the winter does not result in a more comfortable shopping environment for the taxpayer's customers.

App. B at 39a. It may well be that, in some cases, taxpayers will be unable to carry their burden of proving that, as a factual matter, their HVAC systems meet the "sole justification" test when weighed against the incidental effects of the system. But the issue cannot be settled by the sweeping generalization that effects on comfort or ventilation are inherently more than "incidental" in all cases where taxpayers would otherwise heat, ventilate or air-condition their buildings. Such an interpretation renders the regulatory exception created for this precise type of HVAC equipment a virtual nullity.

The Ninth Circuit incorrectly read the regulation to allow employee comfort but not customer comfort. The Court's exclusion of customer comfort from the incidental effects permitted by the regulation categorically excludes an entire class of HVAC equipment from treatment as tangible personal property based merely on the category of end user, *i.e.*, a retail business. Rationally construed, the regulation's focus on employee comfort cannot be taken so literally. It merely reflects the regulation's discussion of equipment used in an industrial context. More importantly, the fundamental distinction created by the statutory and regulatory framework generally, and in relation to HVACs particularly, is between (i) structural components that are an integral part of a building's op-

eration and maintenance and (ii) tangible personal property essential to, and installed for, the operation of equipment. Petitioner's HVAC system must be evaluated in light of, and solely by reference to, this basic distinction.

The distinction is important not only for purposes of the investment tax credit for years prior to 1986. The availability of accelerated depreciation turns on the same distinction. HVAC systems treated as "structural components" of a building are subject to straight-line depreciation over more than a 30-year period. By contrast, if treated as "tangible personal property", accelerated depreciation over a shorter five-year period is available. *See* Prop. Treas. Reg. § 1.168-3(c); Reg. § 1.1245-3(c)(2). The continuing effect of the Ninth Circuit's flawed interpretation of the "sole justification" test is another reason to grant certiorari in this case.

CONCLUSION

The decision in this case holds that an HVAC system installed and operated to maintain the temperature and humidity requirements of other equipment cannot satisfy the "sole justification" test because secondary effects of its operation are inherently not incidental. The Ninth Circuit's decision in this respect is contrary to the explicit regulatory exception created for HVAC equipment installed for this purpose, is inconsistent with the required facts-and-circumstances inquiry into the taxpayer's intent in installing and operating the equipment, and, in practical effect, eviscerates the regulatory exception. It has infected the treatment of HVAC systems in the retail food industry with considerable uncertainty for purposes of the investment tax credit and accelerated depreciation and creates an acknowledged and direct conflict with the Eleventh Circuit and the Tax Court. For these reasons, the amicus respectfully urges that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

Of Counsel
RITA A. CAVANAGH
DEWEY BALLANTINE
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006-4605
(202) 862-1000

ROGER A. CRAWFORD, JR.
FOOD MARKETING INSTITUTE
800 Connecticut Ave., N.W.
Washington, D.C. 20006-2701

GERALD A. KAFKA
Counsel of Record
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1775 Pennsylvania Ave., N.W.
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(202) 862-1000
Counsel for Amicus Curiae